82-1513

Office-Supreme Court, U.S.
FILED
MAR 14 1983
ALEXANDER L. STEVAS,
CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1982

ESCAMBIA RIVER ELECTRIC COOPERATIVE, INC.,

Appellant,

v.

FLORIDA PUBLIC SERVICE COMMISSION and GULF POWER COMPANY,

Appellees

JURISDICTIONAL STATEMENT

Henry L. Gray, Jr.
(Counsel of Record)
and William H. Chandler

HENRY L. GRAY, JR.
CHANDLER, O'NEAL, GRAY, LANG & HASWELL
P. O. Drawer 0
Gainesville, Florida 32602
Telephone No. 904-376-5226

Attorneys For Appellant

March 14, 1983

QUESTIONS PRESENTED

1. May a state determine that a private utility company is entitled to serve a customer within a rural area historically served by a rural electric cooperative, and deny such right to the cooperative, upon the basis of a policy favoring the private utility because of alleged preferential economic advantage given cooperatives by Congress, when such policy has no legitimate, rational state regulatory basis?

2. Does such policy constitute an arbitrary and unreasonable exercise of governmental power, constituting a denial to the cooperative of due process and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution?

TABLE OF CONTENTS

Page

Question Presented i

Table of Authorities ii

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions 1

Statement of Case 3

The Question is Substantial 7

Conclusion 10

Appendix

A. Opinion of Supreme Court of Florida A-1

B. Order of Florida Public Service Commission B-1

C. Order Denying Rehearing C-1

D. Remarks of Commissioner Leisner D-1

E. Remarks of Commissioner Gunter E-1

F. Notice of Appeal F-1

TABLE OF AUTHORITIES

CASES

Alabama Power Co. v. *Alabama Electric Cooperative, Inc.*,
394 F.2d 672 (5th Cir.) *reh'g denied* 397 F.2d 809, *cert. denied*
393 U.S. 1000 (1968) 7

Atchison, Topeka, and Santa Fe Ry. Co. v. *Public Utilities Commission of the State of California*,
346 U.S. 346 (1953) 1

Dairyland Power Cooperative,
37 F.P.C. 12, 35 L.W. 2385 7

Gainesville-Alachua County Regional Electric Water and Sewer Utilities Board v. *Clay Electric Cooperative, Inc.*,
340 So.2d 1159 (Fla. 1976) 4

Rural Electrification Administration v. *Central Louisiana Electric Co.*,
354 F.2d 859 (5th Cir.), *cert. denied* 385 U.S. 815, *reh'g denied*
385 U.S. 964 (1966) 9

Salt River Project Agr. Dist. v. *Federal Power Comm.*,
391 F.2d 470, 473 (D.C. Cir. 1968) 7, 9

Tampa Electric Co. v. *Withlacoochee River Elec. Cooperative*,
122 So.2d 471, 473 (Fla. 1960) 8

Zobel v. *Williams*,
457 U.S. _____ (1982) 8

CONSTITUTIONAL PROVISIONS

United States Constitution, Fourteenth Amendment 1

FEDERAL STATUTORY PROVISIONS

28 U.S.C. §1257(2) 1

7 U.S.C. §901, *et seq.* 9

FLORIDA STATUTORY PROVISIONS

§366.04(2)(e) *Fla. Stat.* (1980 Supp.) 2

§366.04(3) *Fla. Stat.* 4

§366.04(3) *Fla. Stat.* (1981) 2, 4, 8

§366.10 *Fla. Stat.* (1981) 5,6

§425.03(1) *Fla. Stat.* (1981) 2

§425.04(4) *Fla. Stat.* (1981) 2

FLORIDA RULES OF APPELLATE PROCEDURE

Fla.R.App.P. 9.030(a)(B)(ii) 5

Fla.R.App.P. 9.040(e) 6

Fla.R.App.P. 9.210(b)(4) 6

OPINIONS BELOW

The Order of the Florida Public Service Commission (App. B) is unreported. The opinion of the Supreme Court of Florida (App. A) is reported at 421 So.2d 1384 (Fla. 1982). The Order Denying Rehearing (App. C) is unreported.

JURISDICTION

Appellant appeals from the decision of the Supreme Court of Florida rendered on September 2, 1982, (App. A), rehearing denied on December 15, 1982, (App. C). Such opinion affirmed the Order of the Florida Public Service Commission involving a territorial dispute between Appellant, a rural electric cooperative, and Appellee, Gulf Power Company, an investor-owned utility, and which determined the issues in favor of Appellee.

A Notice of Appeal to this Court was filed in the Supreme Court of Florida on March 4, 1983, (App. F).

This appeal is being docketed in this Court within ninety days from the denial of rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2) and *Atchison, Topeka, and Santa Fe Ry. Co.* v. *Public Utilities Commission of the State of California*, 346 U.S. 346 (1953).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

§366.042(2) (e), *Fla. Stat.* (1980 Supp.) provides in pertinent part:
"In the exercise of its jurisdiction, the Commission shall have power over rural electric cooperatives...to resolve any territorial dispute involving service areas between and among rural electric cooperatives...and other electric utilities under its jurisdiction. In resolving territorial disputes, the Commission may consider, but not be limited to consideration of, the ability of the utilities to expand services within their own capabilities and the nature of the area involved, including population, the degree of urbanization of the area, its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services."

§366.04(3), *Fla. Stat.*, 1981, provides:
"(3) The Commission shall further have jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities."

§425.03(1), *Fla. Stat.*, 1981, provides:
"Rural area" means any area not included within the boundaries of an incorporated city, town, village, or burrough, having a population in excess of 2,500 persons."

§425.04(4), *Fla. Stat.*, 1981, provides in pertinent part:
"A cooperative shall have power...to...supply electric energy in rural areas..."

STATEMENT OF CASE

1. This case involves the question of whether the Florida Public Service Commission may resolve a territorial dispute between a rural electric cooperative and an investor-owned utility company, by directing that the investor-owned utility company be permitted to extend its service into the geographical area served exclusively by the cooperative for more than 30 years, upon the announced policy that cooperatives enjoy preferential economic advantage, were not set up to take business away from private utilities, and should not compete with investor-owned utility companies.

2. These proceedings commenced on July 6, 1981, when Appellant filed an emergency petition with the Florida Public Service Commission, wherein it sought an order of the Commission to prevent Appellee, Gulf Power Company, from extending its electrical transmission lines into Appellant's service area in order to serve two customers at a single site. Such emergency petition asserted a paramount right to serve the customers who are located in Escambia's exclusive area of service. Two days later, on July 8, 1981, Gulf filed its response, essentially denying that the customers were in Escambia's area of service, and asserting its own paramount right to serve them. Contemporaneous with the filing of its response to the emergency petition, Gulf filed its motion seeking an immediate hearing on or before July 16, 1981. The Florida Public Service Commission acted promptly upon such motion, and scheduled the matter for immediate hearing on July 16, 1981.

3. The dispute arose when the customer, Exxon, U.S.A., requested that Gulf provide electric service to its Blackjack Creek site in rural Santa Rosa County, Florida. The evidence reveals without dispute that Gulf's closest customer was 6.7 miles north of the Exxon site, and which Gulf began serving in 1974, by crossing Escambia's transmission lines. The evidence further showed that Escambia had 1,102 customers within that same 6.7 mile area, and that Escambia actually had a distribution line to the site serving Exxon Pipeline Company since 1974.

§366.04(3), *Fla. Stat.*, 1981, mandates that the Florida Public Service Commission, in exercising its jurisdiction, act in a manner which prevents an uneconomic duplication of electrical distribution and transmission facilities. In fact, in responding to an assertion that §366.04(3), *Fla. Stat.* was an unconstitutional delegation of legislative power, the Florida Supreme Court in *Gainesville-Alachua County Regional Electric Water and Sewer Utilities Board* v. *Clay Electric Cooperative, Inc.*, 340 So.2d 1159 (Fla. 1976), found that such statute was not an unlawful delegation of power, concluding that "the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities," citing §366.04(3), *Fla. Stat.* is the limitation or guideline upon which the Florida Public Service Commission may exercise its jurisdiction, as follows:

> "(3) The Commission shall further have jurisdiction over the planning, development, and maintenance, of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities."

4. Notwithstanding the clear mandate of §366.04(3), *Fla. Stat.* 1981, and the limitation theretofore imposed by the Florida Supreme Court upon the Florida Public Commission in regard to the Commission's exercise of its jurisdiction in *Gainesville, supra,* the Florida Public Service Commission rendered its Order upon an announced policy that rural electric cooperatives were formed to serve rural America and were not set up to take business away from private utilities. At the conclusion of the Administrative Hearing, Commissioner Leisner stated into the record (APP.D.):

> "...So what I come down to, since everything else seems to be equal, is that Gulf Power versus Escambia River, we have an investor owned utility against a cooperative, and that brings me down to the purpose of the cooperative and why it was formed; and going back to

what Mr. Vinson brought out, it is my understanding and always has been that REA's were set up to bring electricity to rural America and they are not set up to take business away from private utilities. And in this case you have a subsidized company trying to complete with an investor owned company, and I have to go with giving the business to the investor owned company. This is a large industrial company; it is not a rural-residential decision. And, therefore, I would move to dismiss the Petition of Escambia River."

Commissioner Gunter, acting as Chairman, supported her motion and, thereupon, stated (APP.E.):

"...the pervasive thing as brought out by Commissioner Leisner was what's really the purpose. We have one area that's one operation which does have favorable financial aspects due to legislation on the federal level, and then you get to the situation of what were they designed for, and it's really a perception on my part as well as response on the part of witnesses, and as Commissioner Leisner's questioning to that witness brought forth, the primary purpose of REA's in this country–and God knows they have done a super job..."

The Supreme Court of Florida affirmed the decision of the Florida Public Service Commission in a four to three decision, in which the Court found that there was substantial, competent evidence to support the findings of fact of the Commission, but in which the Court omitted any reference to the constitutional issues firmly presented, briefed, and argued before it.

5. Such omission by the Court was not due to the failure of Appellant to properly, and in a timely manner, raise the constitutional issue. Such issue arose only at the conclusion of the administrative proceedings when the triers of fact announced into the record their findings and the bases for their ruling (App. C,D). Under Florida law the decision of the Florida Public Service Commission is reviewable by direct appeal to the Supreme Court of Florida. Fla.R.App.P. 9.030(a) (1) (B) (ii); §366.10, *Fla.*

Stat, 1981. Appellate practice in Florida neither requires nor permits assignments of error. Fla.R.App.P. 9.040(e). The issues on appeal were framed in Appellant's Initial Brief. Fla.R.App.P. 9.210(b) (4). Those issues were stated as follows:

POINT I

THE FINDINGS OF FACT OF THE PSC ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, AND DO NOT COMPORT WITH REASON AND LOGIC.

POINT II

THE ANNOUNCED POLICY BASIS UPON WHICH PSC RENDERED ITS DECISION AMOUNTS TO AN ARBITRARY AND OPPRESSIVE EXERCISE OF GOVERNMENTAL POWER, IS CONTRARY TO THE ANNOUNCED POLICY OF THE PSC, IS CONFISCATORY OF APPELLANT'S RIGHTS, IS A DENIAL OF DUE PROCESS OF LAW, AND DENIES APPELLANT ITS RIGHT TO EQUAL PROTECTION OF THE LAW, AS GUARANTEED BY SECTIONS 2 AND 9 OF ARTICLE I OF THE CONSTITUTION OF THE STATE OF FLORIDA, AND THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

6. The consitutional issues presented to this Court were raised by the brief and argument of Appellant in the Supreme Court of Florida.

The decision of the Florida Public Service Commission, as approved by the Supreme Court of Florida, is based upon a factor totally unrelated to the State's legitimate objectives in the resolution of territorial disputes. The decision from which this appeal is taken is expressly grounded upon the fact that Appellant is a rural electric cooperative; that cooperatives receive low-interest loans from the federal government; and the intent of Congress in enacting the Rural Electrification Act in 1936 was to bring electricity to rural areas of America not otherwise receiving electric service. Such grounds are wholly unrelated to the legitimate statutory objectives of the State of Florida in resolving territorial disputes, and their use by the Commission in arriving at its decision is clearly erroneous. The effect is to relegate rural electric cooperatives to second class citizenship when competing for customers with investor-owned utilities, thereby denying cooperatives equal protection of the law.

THE QUESTION IS SUBSTANTIAL

Rural electric cooperatives are something more than public utilities competing with privately owned power companies. They are instrumentalities of the United States. In *Alabama Power Co.* v. *Alabama Electric Cooperative, Inc.*, 394 F.2nd 672, 677 (5th Cir.) *reh'g denied* 397 F.2d 809, *cert. denied* 393 U.S. 1000 (1968). the Court stated:

> "The Power Company would treat REA simply as a rival public utility. We agree with the recent decision of the Federal Power Commission in *Dairyland Power Cooperative*, 37 F.P.C. 12, 35 L.W. 2385, that rural electric cooperatives are something more than public utilities; they are instrumentalities of the United States. 'They were chosen by Congress for the purpose of bringing abundant, low cost electric energy to rural America.' See also, *Salt River Project Agr. Dist.* v. *Federal Power Comm.*, D.C.Cir. 1968, 391 F.2d 470."

However, the Supreme Court of Florida has ruled that a rural electric cooperative may not compete on an equal basis with other utilities, making it, then, a second class citizen. The State of Florida does recognize that a utility company is possessed of property or property rights in its customers and that an extension of service by one utility in contravention of the rights of another is tantamount to an unlawful injury or hindrance to such property rights. *Tampa Electric Co.* v. *Withlacoochee River Elec. Cooperative,* 122 So.2d 471, 473 (Fla. 1960).

Obviously, then, the opinion of the Supreme Court of Florida in affirming the Florida Public Service Commission has deprived Escambia of its property rights without due process of law, and has denied Escambia the equal protection of the law, both as guaranteed by the Fourteenth Amendment to the United States Constitution. Such decision will, thereupon, cause irreparable harm to all rural electric cooperaives in Florida.

The grounds enunciated by the Florida Public Service Commission, and affirmed by the Supreme Court of Florida, bear no rational relationship to the legitimate interest of the State of Florida in maintaining a power supply system within the State which will sufficiently provide for the needs of its citizens without unnecessary duplication of facilities. §366.04(3) *Fla. Stat.,* 1981. Viewed in such light, the decision is arbitrary, oppressive, and constitutionally impermissable. Cf. *Zobel* v. *Williams,* 457 U.S. _____ (1982). The nature of the business of cooperatives is such that the overall costs to individual customers are reduced when the cooperatives render service to new customers, and especially large ones. By permitting a competing utility company to invade an area which has been served exclusively for more than 30 years by a cooperative, the State of Florida has doomed the customers of the cooperative by burdening them with the inevitability of higher and higher rates, instead of a reduction of rates as normal growth would permit.

The fact that cooperatives receive low interest loans from the United States government should have been completely irrelevant to the issues in the territorial dispute. The Rural Electrifica-

tion Administration was established by Congress in 1936, in order to bring low cost electricity to rural areas. *Salt River Project Agr. Dist.* v. *Federal Power Comm.*, 391 F.2d 470, 473 (D.C. Cir. 1968). The Rural Electrification Administration was empowered by Congress to make low interest loans in order to attain the stated objective of the act. 7 U.S.C. §901 *et. seq.*

The inquiry of this Court must, therefore, be made as to whether the fact of such loans has any proper, reasonable, or rational connection with the State's objective in providing for a coordinated power supply for the State of Florida. Although Florida has now ruled that cooperatives should not compete with investor-owned utilities, in rural areas, the federal courts have determined that economic competition between rural electric cooperatives and other utilities should be encouraged, not prevented. *Rural Electrification Administration* v. *Central Louisiana Electric Co.*, 354 F.2d 859 (5th Cir.), *cert. denied* 385 U.S. 815, *reh'g denied* 385 U.S. 964 (1966). The congressionally authorized low interest loans to cooperatives are wholly unrelated to the legitimate statutory objectives of the State of Florida, and were improperly considered by the Florida Public Service Commission and the Supreme Court of Florida.

CONCLUSION

Probable jurisdiction should be noted in this case in view of the apparent constitutional violations, conflict with existing federal case law and the substantial nature of the issue involved.

Respectfully submitted,

Henry L. Gray, Jr.

CHANDLER, O'NEAL,
GRAY, LANG & HASWELL
P. O. Drawer 0
Gainesville, Florida 32602
904-376-5226
Counsel of Record for Appellant

ESCAMBIA RIVER ELECTRIC
COOPERATIVE, INC.,
Appellant,

v.

FLORIDA PUBLIC SERVICE COMMISSION,
and GULF POWER COMPANY,
Appellees.

No. 61-679

Opinion of Supreme Court of Florida

September 2, 1982

ALDERMAN, C.J.

Escambia River Electric Cooperative, Inc., seeks review of an order of the Public Service Commission resolving a territorial dispute in favor of Gulf Power Company, We affirm.

Escambia River filed a petition with the Commission under authority of section 366.04(2) (e), Florida Statutes (1980 Supp.), seeking resolution of a territorial dispute between it and Gulf Power Company. At the conclusion of a public hearing, the Commission found that both Escambia River and Gulf Power had the generating capacity, transmission facilities, and reliability to provide the requested 115 kv service, that both companies had customers in and around the disputed area, that there would be no duplication of transmission facilities because neither company had 115 kv lines in the area, and that the cost of providing the requested service would be approximately the same for the two companies.

The Commission then ruled in favor of Gulf Power declaring that it was entitled to provide power to the Exxon Blackjack Creek Miscible Gas Displacement Project and that Escambia

River was prohibited from serving the Project. In support of its ruling, the Commission stated:

> The facts in this dispute fail to demonstrate any significant advantage possessed by Gulf or Escambia with respect to capacity to provide the electrical power requirements requested by Exxon. The Commission is basically confronted in this case with a policy decision as to whether a privately owned utility or a rural electric cooperative should serve requirements of this nature when no factual or equitable distinction exists in favor of either party. The Commission concludes that the dispute must be resolved in favor of Gulf Power Company.
>
> We feel that our decision comports with the policy delineated in *Tampa Electric Co.* v. *Withlacoochee River Coop.*, 122 So.2d 471 (Fla. 1960). In that case, the "preferential economic advantage" enjoyed by rural electric cooperatives, such as Escambia, and the "fundamental underlying purposes which motivated the establishment of the rural electrification program" were enunciated as grounds for enjoining Withlacoochee from providing electrical service in competition with Tampa Electric Company, a private utility.
>
> The plain language as well as the spirit of Section 425.04, Florida Statutes, was additionally cited as a statutory prohibition against such competition. The Florida Supreme Court further observed in *Withlacoochee* as follows:
>
> > It is a matter of common knowledge that the real purpose to be served in the creation of REA was to provide electricity to those rural areas which were not being served by any privately or governmentally owned public utility. It was not intended that REA should be a competitor in those areas in which as a matter of fact electricity is available by application to an existing public utility holding a

franchise for the purpose of selling and serving electricity in a described territory.

While we recognize the valuable service performed by the cooperatives, we believe that this case, too, presents an example of the type of electrical requirements that is beyond the basic intent and purpose of the cooperatives, especially when a privately owned utility can reasonably meet those requirements.

We find, contrary to the arguments made by Escambia River, that the record contains competent substantial evidence to support the Commission's findings of fact. We also find that when, as in the present case, no factual or equitable distinction exists in favor of either utility, *Tampa Electric Co.* v. *Withlacooche River Electric Cooperative, Inc.*, 122 So.2d 471 (Fla. 1960), controls, and the territorial dispute is properly resolved in favor of the privately owned utility. We therefore agree with the Commission's conclusion of law concerning the application of *Withlacoochee* to the factual situation in the present case, and we affirm its order resolving the territorial dispute in favor of Gulf Power.

We disagree, however, with the Commission's alternative finding that its more extensive jurisdiction over privately owned utilities is an additional consideration supportive of a policy decision in favor of Gulf Power. We disapprove the jurisdictional distinction as a valid reason to support a ruling for a privately owned utility and against a rural electric cooperative in a territorial dispute.

Accordingly, we affirm the decision of the Public Service Commission.

It is so ordered.

BOYD, SUNDBERG and McDONALD, JJ., Concur
ADKINS, OVERTON and EHRLICH, JJ., Dissent

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Public Service Commission

Henry L. Gray, Jr. of Chandler, O'Neal, Gray, Lang and Haswell, Gainesville, Florida,

for Appellant

William S. Bilenky, General Counsel and Kathleen Villacorta, Associate General Counsel, Tallahassee, Florida, for Florida Public Service Commission; and C. Roger Vinson of Beggs and Lane, Pensacola, Florida, for Gulf Power Company,

Appellees

George C. Douglas, Jr., Andalusia, Alabama,

for Alabama Electric Cooperative, Inc., Amicus Curiae

APPENDIX B

ORDER OF FLORIDA PUBLIC
SERVICE COMMISSION

DOCKET NO. 810265-EU
ORDER NO. 10171
ISSUED: 7/31/81

In re: An Emergency Petition of Escambia River Electric Cooperative, Inc., Against Gulf Power Company.

The following Commissioners participated in the disposition of this matter:

GERALD L. GUNTER
SUSAN W. LEISNER

Pursuant to notice, the Florida Public Service Commission held public hearing on the above matter in Tallahassee, Florida on July 16, 1981.

APPEARANCES: Henry L. Gray,
Attorney at Law,
Post Office Drawer 0
Gainesville, Florida 32602
for Escambia River Electric Cooperative, Inc.

C. Roger Vinson
Attorney at Law
Post Office Box 12950
Pensacola, Florida 32576
for Gulf Power Company.

Arthur R. Shell, Jr.
101 East Gaines Street
Tallahassee, Florida 32301
for the Commission Staff and the Public generally.

Prentice P. Pruitt
101 East Gaines Street
Tallahassee, Florida 32301
Counsel to the Commissioners.

ORDER

BY THE COMMISSION:

On July 6, 1981, Escambia River Electric Cooperative filed a petition seeking resolution of a territorial dispute between the cooperative and Gulf Power Company. The petition alleged an emergency condition requiring an immediate hearing. In its response, Gulf Power Company agreed that the matter should be given expedited consideration. Pursuant to agreement of the parties, a public hearing was conducted in Tallahassee on July 16, 1981.

The petition was filed under authority of Section 366.04 (2) (e), Florida Statutes. The Commission is empowered under that Section as follows:

> (e) To resolve any territorial dispute involving service areas between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction. In resolving territorial disputes, the commission *may consider,* but not be limited to consideration of, the ability of the utilities to expand their

services within their own capabilities and the nature of the area involved, including population, the degree of urbanization of the area, its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services. (emphasis added)

FINDINGS OF FACT

Evidence adduced by Gulf and Escambia substantiated the necessity for an immediate hearing in that Exxon Company, U.S.A., a division of Exxon Corporation has requested Gulf Power Company to provide service to its Blackjack Creek Miscible Gas Displacement project by October 1, 1981. Exxon requires temporary service with an initial load of 1075 kw to be served from a 46/4.16 kv substation. Permanent service with an initial load of 1665 kw to be provided subsequently from a 115/12.47 kv substation is required to commence on January 1, 1983.

Also included in the dispute is a request for service to Air Products and Chemicals, Inc., which requires a portion of the total electrical power demand at the Blackjack site, situated, lying, and being in Section 23 Township 4 North, Range 29 West, approximately two and one half (2½) miles South of the Community of Cobbtown, Santa Rosa County, Florida. Air products power requirements involve permanent service having an initial load of 2430 kw to be served from a 115/12.47 kv substation. Although both Exxon and Air Products and Chemicals require 115/12.47 kv service, the timing of Air Product's requirements establish the inservice date for the permanent facilities as August 1, 1982.

Both Escambia and Gulf have the present capability, from the stand point of generating capacity, adequacy of transmission facilities, and reliability, to serve the requested load. The requisite 115 kv transmission line needed to provide service to the site would require construction by Gulf of approximately six (6) miles of transmission facilities, while Escambia would need ap-

proximately three and one half (3½) miles of additional line. Gulf's line would be initially constructed to provide 115 kv service. Escambia, on the other hand, proposes to construct a temporary one and one half (1½) mile 46 kv transmission line, to serve the initial load and would thereafter build a three and one half (3½) mile line to meet the requested permanent 115 kv load in late 1982.

Gulf estimated construction of its proposed 115 kv transmission line would be $1,057,000. Escambia originally alleged that construction of its proposed permanent and temporary transmission lines would cost approximately $1,100,000, but at the hearing, estimated that construction of the permanent 115 kv line would be $650,000 and that the temporary 46 kv line would cost approximately $70,000. The discrepancy was not resolved.

Escambia would have to obtain its right-of-way, but Exxon has agreed to permit Gulf's construction of the 115 kv line along an oil-pipe ine route it presently owns. At the hearing, Escambia presented no evidence as to the costs associated with the right-of-way it would have to purchase, nor with the removal of the temporary 46 kv line once its 115 kv line is placed in service.

Presently, neither Gulf nor Escambia has any transmission line of 115 kv capacity in the Blackjack Creek area in which Exxon and Air Products have requested service. Thus, the construction of a line by either will not result in a duplication of transmission facilities in the area.

The disputed area is a rural area as defined under Section 425.03, Florida Statutes,"...any area not included within the boundaries of any incorporated or unincorporated city, town, village, or borough having a population in excess of 2,500 persons...". Escambia presently serves approximately 6,200 customers in its general service area, an increase from an estimated 5,800 customers in 1970. The general area is relatively stable economically, and its population is not projected to grow significantly or become "urbanized" in the immediate future.

The majority of Escambia's 1,102 customers served in the disputed area are residential in character, with some small commerical operations or other small loads. Escambia has only one large load customer, which is Brad High School. Gulf has one large customer in the immediate area, "Exxon 5," from which it proposes to extend the 115 kv transmission line to Blackjack Creek. Escambia had been requested to serve "Exxon 5," but could not provide the loop feed requested at that time. The power requirements at the Blackjack Creek facility will be 6 megawatts, a load sufficient to serve a small town. The rates quoted by Gulf and Escambia to serve the load were substantially the same.

CONCLUSIONS OF LAW

The facts in this dispute fail to demonstrate any significant advantage possessed by Gulf or Escambia with respect to capacity to provide the electrical power requirements requested by Exxon. The Commission is basically confronted in this case with a policy decision as to whether a privately owned utility or a rural electric cooperative should serve requirements of this nature when no factual or equitable distinction exists in favor of either party. The Commission concludes that the dispute must be resolved in favor of Gulf Power Company.

We feel that our decision comports with the policy delineated in *Tampa Electric Co.* v. *Withlacoochee River Coop.*, 122 So 2d 471, (Fla. 1960). In that case, the "preferential economic advantage" enjoyed by rural electric cooperatives, such as Escambia, and the "fundamental underlying purposes which motivated the establishment of the rural electrification program" were enunciated as grounds for enjoining Withlacoochee from providing electrical service in competition with Tampa Electric Company, a private utility.

The plain language as well as the spirit of Section 425.04, Florida Statutes, was additionally cited as a statutory prohibition

against such competition. The Florida Supreme Court further observed in Withlacoochee as follows:

> It is a matter of Common knowledge that the real purpose to be served in the creation of REA was to provide electricity to those rural areas which were not being served by any privately or governmentally owned public utility. It was not intended that REA should be a competitor in those areas in which as a matter of fact electricity is available by application to an existing public utility holding a franchise for the purpose of selling and serving electricity in a described territory.

While we recognize the valuable service performed by the cooperatives, we believe that this case, too, presents an example of the type of electrical requirements that is beyond the basic intent and purpose of the cooperatives, especially when a privately owned utility can reasonably meet those requirements.

Moreover, this Commission has comprehensive jurisdiction over investor-owned utilities such as Gulf respecting"...fair and reasonable rates and charges, classifications, standards of quality and measurements, and service rules and regulations...", Section 366.05 (1), Florida Statutes. We do not have similar jurisdiction over rural electric cooperatives. We believe that the determination of rates through public, adversarial Commission hearings, subject to review by courts of competent jurisdiction, creates an environment amicable to industrial development and find this to be an additional consideration supportive of a policy decision in favor of Gulf Power Company. Accordingly, it is

ORDERED by the Florida Public Service Commission that Gulf Power Company be and is hereby entitled to provide electric power to the Exxon Blackjack Creek Miscible Gas Displacement Project. It is further

ORDERED that Escambia River Electric Cooperative is hereby prohibited from serving said Project.

By ORDER of the Florida Public Service Commission, this 31st day of July 1981.

(SEAL)

/s/ Steve Tribble
COMMISSION CLERK

ARS

APPENDIX C

ORDER OF THE SUPREME COURT OF FLORIDA DENYING REHEARING

IN THE SUPREME COURT OF FLORIDA

WEDNESDAY, DECEMBER 15, 1982

ESCAMBIA RIVER ELECTRIC COOPERATIVE, INC.,
Appellant,

vs.

FLORIDA PUBLIC SERVICE COMMISSION and
GULF POWER COMPANY,
Appellees.

CASE NO. 61,679

On consideration of the motion for rehearing filed by attorneys for appellant, and replies thereto,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

ALDERMAN, C.J., BOYD and McDONALD, JJ., Concur
OVERTON, J., Concurs specially: I vote to deny rehearing because, although I disagree with the majority opinion there is nothing new in the petition for rehearing and the resignation of a member of this court is not grounds for rehearing.
ADKINS and EHRLICH, JJ., Dissent

A True Copy

TEST:

/s/ Sid J. White
Clerk Supreme Court

C

cc: Henry L. Gray, Jr., Esquire
of Chandler, O'Neal, Gray,
Lang & Haswell
Kathleen Villacorta, Esquire
C. Roger Vinson, Esquire
of Beggs & Lane
George C. Douglas, Jr., Esquire

APPENDIX D

EXCERPT FROM ORAL FINDINGS OF FACT AND CONCLUSIONS OF LAW BY COMMISSIONER LEISNER ENUNCIATED INTO THE RECORD AT THE CONCLUSION OF THE ADMINISTRATIVE HEARING APPEARING AT PAGES 263-264 OF THE TRANSCRIPT

"COMMISSIONER LEISNER: Well, as I can see the issues outlined by both of you, there are several things that we're considering. The first one is territorial, and, as I view the evidence in this case, there really isn't any clearly drawn boundary in this case. Both companies have customers in and around this area.

Second of all, we talked about the duplication. It seems to me neither company is currently serving Exxon; there's no duplication of service here; both would have to build. Since no one is serving Exxon, then there's no displacement in this case either. The cost to both companies seems to be approximately equal. So what I come down to, since everything else seems to be equal, is that Gulf Power versus Escambia River, we have an investor owned utility against a cooperative, and that brings me down to the purpose of the cooperative and why it was formed; and going back to what Mr. Venson brought out, it is my understanding and always has been that the REA's were set up to bring electricity to rural America and they are not set up to take business away from private utilities. And in this case you have a subsidized company trying to compete with an investor owned company, and I have to go with giving the business to the investor owned company. This is a large industrial company; it is not a rural-residential decision. And, therefore, I would move to dismiss the Petition of Escambia River."

APPENDIX E

EXCERPT FROM ORAL FINDINGS OF FACT AND CONCLUSIONS OF LAW BY COMMISSIONER GUNTER ENUNCIATED INTO THE RECORD AT THE CONCLUSION OF THE ADMINISTRATIVE HEARING APPEARING AT PAGES 264-267 OF THE TRANSCRIPT

"CHAIRMAN GUNTER: Commissioner, I support your motion and I want to give a couple of reasons why, and mine parallel yours very closely, but there's some others. I listened very carefully and evaluated the issues, and I made my little list a little differently than you did. I looked at the issue of waste, whether there's going to be a waste in construction—and that's my terminology—as to whether it would be more expensive for one than the other, and we talked about the difference of three-and-a-half to six-plus miles. And then I got to the questioning of—hold it just a second. I want to make sure this is correct. The questions of Mr. Oerting. It was going to be one line constructed, and do it on the front-end, and then the mileage differences begin to disappear when he started adding in the mile-and-a-half temporary line plus the additional mileage for the permanent line. That became kind of a wash; rates became kind of a wash. The customer relationship, which was obvious, and we could refer to the exhibits, exhibits and testimony, of where negotiations had started approximately a year ago, and that the customer in the selection of their supplier by testimony had cooperated to the point that this was a working agreement, working arrangement on right-of-way, easing easements which had existed with property owner's permission that showed to me a very favorable customer-supplier relationship, which I understand courts have said were not the sole reason for awarding of territory.

Both discussed benefits to the customers by base load. I think that's a wash because neither group of customers should be

favored over the other, but the pervasive thing as brought out by Commissioner Leisner was what's really the purpose. We have one area that's one operation which does have favorable financial aspects due to legislation on the federal level, and then you get to the situation of what were they designed for, and it's really a perception on my part as well as response on the part of witnesses, and as Commissioner Leisner's questioning to that witness brought forth, the primary purpose of REA's in this country—and God knows they have done a super job. I'm probably the only person sitting in this room that REA brought me out of the dark ages, out here by service by Talquin Electric in Liberty County, so I certainly appreciate what they have done and what there're doing for rural America, but as far as the industrialization, the overall maintenance of the—I don't know the word I'm quite looking for—the maintenance of trying to attract industrial customers to this part of the world and to all of Florida and the surety of being in an environment where rates can be controlled by due process, through review bodies and on to courts for proper jurisdictions if there are mistakes made, I think just has to lead me to deny the Petition and tell them to get that service to the customer. So the decision of the Commission is unanimous."

APPENDIX F

NOTICE OF APPEAL

IN THE SUPREME COURT OF FLORIDA

NO. 61,679

FILED
MAR. 4 1983
SID J. WHITE
CLERK SUPREME COURT
BY _____
CHIEF DEPUTY CLERK

ESCAMBIA RIVER ELECTRIC COOPERATIVE, INC.,
Appellant,

vs.

FLORIDA PUBLIC SERVICE COMMISSION
and GULF POWER COMPANY,
Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that ESCAMBIA RIVER ELECTRIC COOPERATIVE, INC., the appellant named above, hereby appeals to the Supreme Court of the United States from the decree of the Supreme Court of Florida entered September 2, 1982, rehearing denied December 15, 1982, affirming the Order of the FLORIDA PUBLIC SERVICE COMMISSION entered July 31, 1981, Docket No. 810265-EU, Order No. 10171.

(This appeal is taken pursuant to 28 U.S.C. §1257(2)).

Henry L. Gray, Jr.
CHANDLER, O'NEAL, GRAY, LANG & HASWELL
P. O. Drawer 0
211 N. E. 1st Street
Gainesville, Florida 32602
(904) 376-5226
Attorneys for Appellant

CERTIFICATE OF SERVICE OF NOTICE OF APPEAL

I Henry L. Gray, Jr., a member in good standing of the Bar of the Supreme Court of the United States and of the Supreme Court of Florida, certify that all parties required to be served with a copy of the foregoing Notice of Appeal pursuant to U.S. Supreme Court Rules 10 and 28, 28 U.S.C., have been provided with such by depositing a true copy thereof in the United States post office at Gainesville, Florida, main branch, first-class postage prepaid, to C. Roger Vinson, Esquire, P. O. Box 12950, Pensacola, Florida 32576 and Kathleen Villacorta, Esquire, Associate General Counsel, Florida Public Service Commission, 101 East Gaines Street, Tallahassee, Florida 32301 and The Honorable Steve Tribble, Clerk of the Florida Public Service Commission, 101 East Gaines Street, Tallahassee, Florida 32301 on March 2, 1983.

Henry L. Gray, Jr.

82-1513

Office-Supreme Court, U.S.
FILED
APR 15 1983
ALEXANDER L. STEVAS,
CLERK

NO._____

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1982

ESCAMBIA RIVER
ELECTRIC COOPERATIVE, INC.,

Appellant,

v.

FLORIDA PUBLIC SERVICE COMMISSION
and GULF POWER COMPANY,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF FLORIDA

MOTION TO DISMISS OR AFFIRM

Kathleen Villacorta
(Counsel of Record)
and William S. Bilenky

FLORIDA PUBLIC SERVICE COMMISSION
101 East Gaines Street
Tallahassee, Florida 32303-8153
Telephone No. 904-488-7464

Attorneys for Appellee

April 13, 1983

NO._____

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1982

ESCAMBIA RIVER
ELECTRIC COOPERATIVE, INC.,

Appellant,

v.

FLORIDA PUBLIC SERVICE COMMISSION
and GULF POWER COMPANY,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF FLORIDA

MOTION TO DISMISS OR AFFIRM

TABLE OF CONTENTS

	Page No.
CITATIONS OF AUTHORITY . . .	ii
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
ARGUMENT	12
CONCLUSION	19

CITATIONS OF AUTHORITY

Page No.

Cases

Escambia Electric Cooperative, Inc. v. Florida Public Service Commission, 421 So.2d 1384 (Fla. 1982) . . 10

Lloyd A. Fry Roofing Co. v. Wood, 344 U.S. 157, (1952) . 16

Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1945) . . 15

Rural Electrification Administration v. Central Louisiana Electric Co., 354 F.2d 859 (5th Cir.), cert denied 380 U.S. 815, reh'g denied 385 U.S. 964, (1966) . 16, 18

Tampa Electric Co. v. Withlacoochee River Electric Cooperative, Inc. 122 So.2d 471 (Fla. 1960) . . 10, 11

Constitutional Provisions

U. S. Const. amend. XIV 14

U. S. Const. amend. V 17

Florida Statutes

¶366.04(2)(e), Fla. Stat. . . . 12

¶366.04(3), Fla. Stat. 14, 18

Appellee, Florida Public Service Commission, respectfully moves to dismiss or affirm the judgment of the Florida Supreme Court in this case on the ground that the question is so unsubstantial as not to warrant further argument.

The jurisdictional statement filed by Appellant fully sets forth the opinions below, the jurisdiction and the constitutional and statutory provisions involved. Those matters need not be repeated here.

QUESTIONS PRESENTED

1. May a state resolve a territorial dispute involving a large industrial customer in favor of an investor owned utility rather than a rural electric cooperative on the basis of a policy that when all relevant

factors, including those enumerated in its statutes are equal, the investor owned utility should be granted the authority to provide service?

2. Is such policy founded on a rational state regulatory basis that comports with the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution?

STATEMENT OF THE CASE

On July 6, 1981 Appellant, Escambia River Electric Cooperative (Escambia), filed a petition with Appellee, Florida Public Service Commission (Commission), seeking to prevent Appellee, Gulf Power Company (Gulf), from extending its electrical transmission lines into what Escambia considered its territory. Gulf filed a response to the petition

and requested an expedited hearing. A hearing was held by the Commission on July 16, 1981 during which evidence and argument were heard on the issues presented. The Commission announced its decision in favor of Gulf at the close of the hearing. An order setting forth findings of fact and conclusions of law was issued on July 31, 1981. The facts leading to the Commission's decision may be fairly summarized as follows:

On May 28, 1980 Exxon U.S.A. asked Gulf for a proposal to provide 115 KV service to an area known as the Blackjack Creek site (Tr. 175).[1] In mid February 1981 Exxon U.S.A. and

---

[1]References to the transcript of the Commission hearing are designated "Tr." followed by the page number.

Escambia began discussions relating to the provision of service to the site by Escambia (Tr. 33). Exxon U.S.A. and Air Products, Inc., formally requested 115 KV service from Gulf for the Blackjack Creek site by letter dated June 19, 1981 (Tr. 175). Service was to commence on October 1, 1981 (Tr. 175). As a result of Gulf's willingness to serve the two new industrial customers, Escambia petitioned the Commission to prevent Gulf from extending its electrical transmission lines into what Escambia considered its territory.

Both Gulf and Escambia provide electrical service to customers in the vicinity of the Blackjack Creek site (Tr. 56). From 1939 until December 1, 1980 Escambia's power was supplied on a wholesale basis by Gulf (Tr. 57, 178,

196). Under the provisions of a wholesale tariff, Escambia was entitled to serve users requiring not more than 300 KVA service, meaning residential and small commercial customers (Tr. 177). In October, 1980 Escambia became a member of Alabama Electric Cooperative (AEC) and its power requirements were then met by AEC rather than Gulf (Tr. 38). However, until December 1, 1980 AEC provided service to Escambia through Gulf (Tr. 57). At the time of the hearing, Escambia served 6,200 customers, although none were being served at 115 KV transmission level (Tr. 41, 67). One of its customers, Exxon Pipeline Company, requiring 75 KVA service, is situated adjacent to the Exxon U.S.A./Air Products, Inc., site (Tr. 45). Gulf's customers surround the

disputed area (Tr. 43) and include five industrial customers, one of whom is Exxon U.S.A. near Jay, Florida (Tr. 194).

The Commission found that the disputed area was much smaller than the area described by Escambia and that the number of customers served by the respective utilities was not a determining factor in this case due to the type of service requested.

Both utilities would need to construct new facilities in order to serve the two new customers (Tr. 117). Gulf intended to construct a 115 KV transmission line from its Humble Oil Substation, 6.75 miles northwest of the site (Tr. 192a).[2] A new substation

---

[2]Volume II of the transcript

would be constructed adjacent to the Exxon U.S.A. property (Tr. 192b). The estimated total cost of the right-of-way, transmission line and substation was $1,057,000 (Tr. 193). Gulf would be able to provide permanent service on October 1, 1981 (Tr. 192b).

Escambia alleged in its petition that it could provide the requested service for $1,100,000. At hearing an Escambia witness testified that temporary 46 KV service would be provided from an AEC line 1.25 miles east of the Blackjack Creek site (Tr. 27). Permanent service would be provided by constructing a 115 KV line

---

[2](cont'd) contains two pages marked as page 192. For ease of reference the Commission has referred to the first as 192a and the second as 192b.

3 miles to the site from an AEC substation (Tr. 96). In addition to constructing the 115 KV line to the site, AEC would also have to upgrade 30-35 miles of its existing 46 KV line to its substation (Tr. 86, 97) to meet Exxon's service request (Tr. 111-113). It was estimated that construction costs on that project would total three million dollars (Tr. 114). An AEC witness testified that the latter upgrading project had been planned for some time (Tr. 113). At hearing Escambia presented a different estimate for the cost of providing service to the Blackjack Creek site than the figure alleged in its petition. Construction of the temporary line was estimated to cost between $70,000 and $75,000 and cost of the permanent line was estimated to be between $625,000

and $650,000. (Tr. 100). When questioned, Escambia's witness was unable to resolve the inconsistent estimates.

The Commission found that no displacement of Escambia's service would occur as a result of its decision in favor of Gulf. Escambia serves residential and small commercial customers in the area surrounding the Blackjack Creek territory and has only one large user, a school (Tr. 65). Growth in the area is minimal. In 10 years the utility has taken on only 400 new customers (Tr. 67-68). The Commission granted Gulf the authority to serve Exxon U.S.A. and Air Products, Inc., in a very limited area that has been particularly described in its order. The demand for service by these two customers is at a transmission

level of 115 KV, a much greater level of service than Escambia is providing to any of its present customers. No additional territory or customers were awarded to Gulf by the Commission.

On appeal, the Florida Supreme Court found that the record contained competent substantial evidence to support the Commission's findings. 421 So.2d 1384 (Fla. 1982). Additionally, the court held that when no factual or equitable distinction exists in favor of either utility, the territorial dispute is properly resolved in favor of the privately owned utility. This conclusion was specifically held to be consistent with the court's earlier decision in Tampa Electric Co. v. Withlacoochee River Electric Cooperative, Inc., 122 So.2d 471 (Fla. 1960). In Withlacoochee the court

found that a cooperative was using its preferential economic advantage to serve customers previously being adequately served by an investor owned utility. The dispute was resolved by the court in favor of the investor owned utility. While the facts in Withlacoochee are different from those in the instant case, the principles enunciated by the court apply here: the preferential economic advantage enjoyed by rural electric cooperatives and the fundamental underlying purpose that motivated the establishment of the rural electrification program are legitimate considerations in resolving territorial disputes.

ARGUMENT

This case presents no substantial federal question for review by this Court. The Commission's order, affirmed by the Florida Supreme Court, states that when a decision as to who should serve a large industrial customer must be made and all relevant factors, including those enumerated in Paragraph 366.04(2)(e), Fla. Stat., have been considered and found equal, the investor owned utility should be granted the authority to provide service rather than the cooperative. This policy is constitutionally sound.

The Commission was faced with a statutory obligation to render a decision as to who should provide electrical service in the disputed territory. When it found no equitable or factual distinction in favor of

either utility, it made a policy decision in favor of the investor owned utility. In formulating this policy, the Commission looked at the differences in the financial composition of investor owned utilities and cooperatives. It recognized that cooperatives receive preferential income tax treatment, substantial loans and low loan interest rates. Investor owned utilities, on the other hand, have a capital structure composed of debt and equity, which includes common and preferred stock. Gulf, which does not have access to the low loan interest rates that Escambia does, must pay a higher interest rate for its loans and must pay dividends high enough to attract investors. These higher capital costs increase its financial risk. Because Gulf generates

power as well as delivering it, it also has higher business risk than Escambia, which only delivers power. These considerations are significant enough that when all other factors are equal, the investor owned utility should have the ability to serve the new territory. By awarding the new customer to the utility with greater financial and business risk, the Commission adhered to the mandate of the controlling state statute. This policy clearly has a direct and rational relationship to the state's legitimate interest in assuring "an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities." Paragraph 366.04(3), Fla.

Stat. There has been no violation of the Fourteenth Amendment, but rather the announced policy is in furtherance of the state's legitimate police power, one of the least limitable of governmental powers. Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 83 (1945).

The Florida Supreme Court has not ruled that cooperatives may not compete with investor owned utilities in rural areas, as Escambia asserts. Rather, the court correctly affirmed relevant statutory and policy considerations that are necessarily applicable whenever a cooperative and an investor owned utility are in direct competition and no significant differences exist to distinguish them from each other.

As for Escambia's position that it provides service in the disputed area

and, therefore, the Commission's decision causes an uneconomic duplication of services, the facts do not support this assumption. Because there are no exceptional circumstances surrounding the findings of fact made by the Commission and affirmed by the court, their rejection by this Court is not warranted. Lloyd A. Fry Roofing Co. v. Wood, 344 U.S. 157, 160 (1952).

Escambia cites Rural Electrification Administration v. Central Louisiana Electric Co., 354 F.2d 859 (5th Cir.), cert denied 380 U.S. 815, reh'g denied 385 U.S. 964 (1966), in support of its position that economic competition between rural electric cooperatives and other utilities should be encouraged. That case involved a suit by a privately owned electric utility to enjoin a loan

by the Rural Electrification Administration to an electric cooperative for the construction of facilities. The Fifth Circuit noted in its opinion that no statute or contract existed in this particular case entitling the complaining company to remain free of competition and be the only one of its kind in the territory involved. Because no such right was shown to exist, no property right existed either. The court concluded "that making a loan for the construction of competitive facilities is not a deprivation of property rights guaranteed by the Fifth Amendment." (at 864). As can be seen, this opinion does not stand for the proposition that economic competition should be encouraged between the two types of utilities, but rather, that in the

absence of a statute or contract preventing competition there is no constitutional right to remain free of competition.

In the instant case Paragraph 366.04(3), Fla. Stat., prevents competition by charging the Commission with the duty to assure an adequate and reliable source of energy and the avoidance of an uneconomic duplication of facilities. The Commission's action is consistent with the court's decision in Central Louisiana, contrary to Escambia's assertions.

CONCLUSION

For the reasons stated herein, this appeal should be either dismissed or affirmed.

Respectfully submitted,

Kathleen Villacorta

FLORIDA PUBLIC SERVICE COMMISSION
101 East Gaines Street
Tallahassee, Florida
32301-8153
904-488-7464

Counsel of Record for Appellee

Office-Supreme Court, U.S.
FILED
APR 12 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1513

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ESCAMBIA RIVER ELECTRIC COOPERATIVE, INC.,
Appellant,

v.

FLORIDA PUBLIC SERVICE COMMISSION and
GULF POWER COMPANY,
Appellees.

On Appeal From the Supreme Court of Florida

MOTION TO DISMISS

C. ROGER VINSON
(Counsel of Record)
BEGGS & LANE
P.O. Box 12950
Pensacola, FL 32576-2950
(904) 432-2451
Attorneys for
Gulf Power Company, Appellee

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
MOTION TO DISMISS	1
OBJECT OF MOTION	2
FACTUAL BASIS	3
ARGUMENT	4
(1) This appeal was not taken in conformity with 28 USC § 1257(2)	4
(2) This appeal does not present a substantial federal question	7
(3) Any federal question sought to be reviewed was not timely or properly raised or expressly passed on in the state court	10
(4) The judgment that is the subject of this appeal rests on an adequate non-federal basis	11
CONCLUSION	12

TABLE OF AUTHORITIES

CASES	Page
Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959)	6
Amalgamated Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968)	11
Atchison, Topeka, & Santa Fe Ry. Co. v. Public Utilities Commission of the State of California, 346 U.S. 346 (1953)	4
Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972)	6
Charleston Federal Savings & Loan Ass'n v. Alderson, 324 U.S. 182 (1945)	5
Choctawhatchee Electric Coop., Inc. v. Gulf Power Co., 465 So.2d 417 (Fla. 1st DCA 1972)	9
Escambia River Electric Coop. v. Florida Pub. Serv. Comm'n, 421 So.2d 1384 (Fla. 1982)	10
Guaranty Trust Co. v. Blodgett, 287 U.S. 509 (1933)	12
Jett Bros. Distilling Co. v. City of Carrollton, 252 U.S. 1 (1919)	5
Kingsley Int. Pictures Corp. v. Regents of N.Y.U., 360 U.S. 684 (1959)	12
Rohr Aircraft Corp. v. San Diego County, 362 U.S. 628 (1960)	5
Rural Electrification Administration v. Central Louisiana Electric Co., 354 F.2d 859 (5th Cir.), *cert. den.*, 385 U.S. 815, *reh'g den.*, 385 U.S. 904 (1969)	6
Street v. New York, 394 U.S. 576 (1969)	11
Tampa Electric Co. v. Withlacoochee River Electric Cooperative, Inc., 122 So.2d 471 (Fla. 1960); *cert. den.*, 377 U.S. 952 (1964)	9, 10
Webb v. Webb, 451 U.S. 493 (1981)	11
Wilson v. Cook, 327 U.S. 474 (1946)	5

FEDERAL STATUTORY PROVISIONS	
28 USC § 1257	10
28 USC § 1257(2)	2, 4, 7

TABLE OF AUTHORITIES—Continued

Page

28 USC § 1257(3) 10, 12
28 USC § 2103 ..... 2, 12

FLORIDA STATUTORY PROVISIONS

§ 120.68(10), *Fla. Stat.* (1981) 10
§ 366.03, *Fla. Stat.* (1981) 3
§ 366.04(2)(e), *Fla. Stat.* (1981) 4, 8, 9, 11
§ 366.04(3), *Fla. Stat.* (1981) 7, 9
Chapter 425, *Fla. Stat.* (1981) 7
§ 425.01, *Fla. Stat.* (1981) 7
§ 425.04, *Fla. Stat.* (1981) 7, 11
§ 425.04(4), *Fla. Stat.* (1981) 4, 8, 9

OTHER AUTHORITIES

R. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978) 10, 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1513

ESCAMBIA RIVER ELECTRIC COOPERATIVE, INC.,
Appellant,

v.

FLORIDA PUBLIC SERVICE COMMISSION and
GULF POWER COMPANY,
Appellees.

On Appeal From the Supreme Court of Florida

MOTION TO DISMISS

MAY IT PLEASE THE COURT:

Appellee, Gulf Power Company,[1] moves to dismiss on the following grounds:

(1) This appeal is not within the appellate jurisdiction of this Court, because it was not taken in

---

[1] Gulf Power Company is a wholly-owned subsidiary of The Southern Company, in accordance with the provisions of the Public Utility Holding Company Act of 1935. The other wholly-owned operating subsidiaries of The Southern Company are: Alabama Power Company, Georgia Power Company, and Mississippi Power Company. This statement is made pursuant to Rule 28.1, Rules of the Supreme Court of the United States.

conformity with 28 USC § 1257(2) [Rule 16(1)(a)];

(2) This appeal "does not present a substantial federal question" [Rule 16(1)(b)];

(3) Any "federal question sought to be reviewed was not timely or properly raised or expressly passed on" in the state court [Rule 16(1)(b)]; and

(4) The judgment that is the subject of this appeal "rests on an adequate non-federal basis." [Rule 16(1)(b)].

OBJECT OF MOTION

Appellee's motion to dismiss is intended to show, first, that the appellant did not present its challenges to the Florida Public Service Commission's order in the proper form for invoking this Court's appellate jurisdiction. Nowhere in the appellant's briefs to the Supreme Court of Florida, or in its Jurisdictional Statement, does the appellant allege that the "statute of any state" is "repugnant to the Constitution, treaties or laws of the United States." If, pursuant to 28 USC § 2103, the Court treats this appeal as a petition for certiorari, this motion is intended to show, second, that the appellant has not raised a substantial federal question. The Florida Public Service Commission order, that is the subject of this appeal, merely resolved a simple territorial dispute in accordance with statutory provisions that are exclusively a matter of Florida law. Third, it is the object of this motion to show that any federal question sought to be reviewed by the appellant was not timely or properly raised or expressly passed on in the state court. Finally, it will be shown that the decision below is so obviously correct, on an adequate non-federal basis, as to warrant no further review. Therefore, the appeal should be dismissed, or in the alternative, certiorari should be denied.

FACTUAL BASIS

The findings of fact of the Florida Public Service Commission, contained in Order No. 10171 [Appendix B to appellant's Jurisdictional Statement], are not now disputed. Gulf Power Company received requests for electric service from two industrial customers, Exxon Company, U.S.A., and Air Products & Chemicals, Inc., at the Blackjack Creek Miscible Gas Displacement Project.[2] Thereupon, Escambia River Electric Cooperative, Inc. filed a petition with the Florida Public Service Commission, seeking to have the Commission prohibit Gulf from serving these two industrial customers. Both Gulf Power and Escambia River were, at that time, serving other customers in the same geographic area. Therefore, neither had an exclusive franchise to serve the area[3] and the Commission found that, factually, neither was in a superior position to serve these two customers. As is evident from a review of everything in the record, appellant has not alleged or contended that a Florida statute, as applied, is repugnant to a federal statute, treaty, or constitutional provision. Nor is there any evidence of a substantial federal question presented. Instead, it is abundantly clear that the decision of the Florida Public Service Commission was based exclusively upon the Commission's statutory authority to resolve territorial disputes in accordance with Florida law and the particular facts involved in this case. These facts clearly support this motion.

---

[2] Upon receiving a request for service, an electric utility is under a statutory duty to provide service to the customer. § 366.03, *Fla. Stat.* (1981).

[3] In the appellant's Jurisdictional Statement, the first question presented improperly attempts to define the service territory as "a rural area historically served by a rural electric cooperation," which is contrary to the undisputed evidence that both Gulf and Escambia River had, historically, served this area.

ARGUMENT

(1) *This appeal was not taken in conformity with 28 USC § 1257(2).* This appeal is not within the appellate jurisdiction of this Court because it was not taken in conformity with 28 USC § 1257(2), which provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

The appellant expressly relies on this statute as the basis for this appeal.[4] [See appellant's Jurisdictional Statement, page 1] The decision of the Supreme Court of Florida, which is the subject of this appeal, only mentions two statutes: Section 366.04(2)(e)[5] and Section 425.04(4),[6] *Florida Statutes* (1981). It is readily ap-

---

[4] Appellant additionally relies on *Atchison, Topeka, & Santa Fe Ry. Co. v. Public Utilities Commission of the State of California*, 346 US 346 (1953), to sustain jurisdiction. The *Atchison* case is clearly distinguishable from this case because: (1) in *Atchison*, "the appellants *presented squarely* to the Supreme Court of California their contention that in the allocation of costs, these orders take their property without due process of law and are so arbitrary and burdensome as to constitute an interference with interstate commerce, in violation of the Constitution of the United States." 346 US at 348 (emphasis supplied); and (2) a substantial federal question was presented.

[5] Quoted in appellant's Jurisdictional Statement at page 2.

[6] This statute is quoted only in part in the appellant's Jurisdictional Statement at page 2, and reads in its entirety as:

> [a cooperative shall have power:]
>
> (4) To generate, manufacture, purchase, acquire, accumulate and transmit electric energy, and to distribute, sell, supply, and dispose of electric energy in rural areas to its members, to governmental agencies and political subdivisions, and to

parent, however, that the appellant has not alleged or contended that either of these statutes, or any Florida statute, is repugnant to the Constitution, treaties, or laws of the United States.

It is well recognized that the burden is upon the appellant to establish, for appeal purposes, a proper jurisdictional basis. An appeal from a state court will not lie if the state statute was not "drawn in question" on the ground of being repugnant to the Constitution, treaties, or laws of the United States. *Rohr Aircraft Corp. v. San Diego County*, 362 US 628 (1960); *Wilson v. Cook*, 327 US 474, 482 (1946); *Charleston Federal Savings & Loan Ass'n v. Alderson*, 324 US 182, 185 (1945); *Jett Bros. Distilling Co. v. City of Carrollton*, 252 US 1 (1919). Escambia River has not, therefore, met the statutory jurisdictional requirement.

In its briefs to the Supreme Court of Florida and in its Jurisdictional Statement, appellant does not allege that any Florida statute is unconstitutional or repugnant to any treaty or law of the United States. Instead, in appellant's initial brief to the Supreme Court of Florida, its Point II stated that: "The announced policy basis upon which PSC rendered its decision amounts to an arbitrary and oppressive exercise of governmental power," [7] which violated the appellant's federally pro-

---

other persons not in excess of 10 percent of the number of its members; to process, treat, sell, and dispose of water and water rights; to purchase, construct, own and operate water systems; to own and operate sanitary sewer systems; and to supply water and sanitary sewer services. However, no cooperative shall distribute or sell any electricity, or electric energy to any person residing within any town, city or area which person is receiving adequate central station service or who at the time of commencing such service, or offer to serve, by a cooperative, is receiving adequate central station service from any utility agency, privately or municipally owned individual partnership or corporation;

[7] Appellant's initial brief before the Supreme Court of Florida, at page 13.

tected rights. Again, appellant stated that ". . . the PSC has discriminated against Escambia because Escambia is a cooperative." [8] Appellant further concluded that: ". . . the actions of the PSC amount to the taking of such property without due process of law, and deny Escambia its rights to equal protection of the law," [9] but failed to advance any specifics. In its reply brief, the appellant merely asserted, without further argument, that: "The Commission action is a denial of state and federal constitutional standards." [10]

Similarly, the appellant has failed to challenge any statute, as applied, in its Jurisdictional Statement to this Court. Its second question presented is:

> Does such policy constitute an arbitrary and unreasonable exercise of governmental power, constituting a denial to the cooperative of due process and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution?

The appellant goes on, at page 8 of its Jurisdictional Statement, to state that the decision of the Supreme

---

[8] Appellant's initial brief before the Florida Public Service Commission, at page 19.

[9] Appellant's initial brief before the Supreme Court of Florida, at page 21. With regard to property rights, the cooperative has no property right created by the Constitution, as appellant seems to maintain. *Cf. Board of Regents of State Colleges v. Roth*, 408 US 564, 577 (1972). Nor does the cooperative have any property right in any *potential* customer. *Rural Electrification Administration v. Central Louisiana Electric Co.*, 354 F.2d 859 (5th Cir.), *cert. den.*, 385 US 815, *reh'g den.*, 385 US 904 (1969). With regard to equal protection, the Florida Legislature has placed certain reasonable limitations upon what Florida electric cooperatives can and cannot do. There is no denial of equal protection in such action. *Allied Stores of Ohio, Inc. v. Bowers*, 358 US 522, 528 (1959). None of these arguments were attempted to be advanced before the Supreme Court of Florida by the appellant, however.

[10] Appellant's reply brief before the Supreme Court of Florida, at page 9.

Court of Florida "has deprived Escambia of its property rights without due process of law and has denied Escambia the equal protection of the law." The only reference to a state statute is that:

> The grounds enunciated by the Florida Public Service Commission, and affirmed by the Supreme Court of Florida, bear no rational relationship to the legitimate interests of the State of Florida in maintaining a power supply system within the State which will sufficiently provide for the needs of its citizens without unnecessary duplication of facilities. § 366.04(3), *Fla. Stat.*, 1981.[11]

Nowhere in the Jurisdictional Statement, however, is there a challenge to any specific state statute as is required by Section 1257(2) in order to invoke this Court's appellate jurisdiction.

It is not enough for appellant to merely argue that the effect of an order or policy was a denial of the appellant's federal rights. Thus, having failed to present its challenge in the proper form, the appeal should clearly be dismissed.

(2) *This appeal does not present a substantial federal question.* Escambia River Electric Cooperative, Inc. is a Florida cooperative created under the specific authority of Florida state law.[12] Although it is true that Escambia River Electric Cooperative is eligible to receive reduced-rate loans under federal law, as are all other rural electric cooperatives, such loans are not involved in this case. There is no other federal relationship. It is most important to remember that this cooperative is a creation of Florida law, subject to the powers, authority, and limitations specified under Florida law. Section 425.04,

---

[11] Jurisdictional Statement, at page 8.

[12] Chapter 425, *Fla.Stat.* (1981), "Rural Electric Cooperatives." This chapter is specifically known as the "Rural Electric Cooperative Law." § 425.01, *Fla.Stat.* (1981).

Florida Statutes (1981), sets forth the powers of rural electric cooperatives in general, and is a source of the alleged rights with respect to which the appellant claims it has been denied due process and equal protection. This same section, however, specifically limits the power of Florida rural electric cooperatives, such as Escambia River, from distributing electricity to certain classes of customers. It was the specific language and the underlying policies of Section 425.04(4), *Florida Statutes* (1981), that the Florida Public Service Commission and the Supreme Court of Florida applied in determining that, all other things being equal, Florida law did not intend for Florida rural electric cooperatives to displace service otherwise available to large industrial customers from investor-owned electric utilities serving the same area. The decisions below involved the construction and application of *Florida Statutes*, as applied to a Florida cooperative and involving particular factual circumstances in Florida. These were, necessarily, purely issues of state law.

Furthermore, the Florida Public Service Commission has the authority, under Section 366.04(2)(e), *Florida Statutes* (1981):

> (e) To resolve any territorial dispute involving service areas between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction. In resolving territorial disputes, the Commission may consider, *but not be limited to consideration of*, the ability of the utilities to expand services within their own capabilities and the nature of the area involved, including population, the degree of urbanization of the area, its proximity to other urban areas, and the present and reasonably forseeable future requirements of the area for other utility services. (Emphasis Added)

Under the plain language of the statute, therefore, the Florida Public Service Commission is entitled and authorized to consider other factors in resolving territorial

disputes. These other permissible topics of inquiry would include state public policy and other relevant Florida statutory provisions, such as Section 425.04(4). Whether these are, in fact, permissible topics of inquiry in resolving a territorial dispute is entirely a question of state law.

The Florida Public Service Commission's authority to "resolve any territorial dispute" [13] is intended to, *inter alia*, avoid "uneconomic duplication of generation, transmission, and distribution of faciltes." [14] The appellant's argument, at page 4 of the Jurisdictional Statement, that the non-duplication of facilities provision of Section 366.04(3) is a limitation upon the territorial dispute jurisdiction of Section 366.04(2)(e) is, again, an issue of state law. Section 366.04(2)(e) expressly states that, in resolving territorial disputes, the Commission "may consider, *but not be limited to*," certain factors. Whether the policies of Section 425.04(4), limiting the powers of rural electric cooperatives, may be considered in resolving territorial disputes is a question of Florida law that has long been settled.[15] Thus, Escambia River's attempted argument regarding an unlawful delegation of legislative authority is a matter for the state courts to determine and decide. It clearly is not a "substantial federal question."

The Supreme Court of Florida concluded that the Florida Public Service Commission had properly exercised its statutory duty, pursuant to Section 366.04(2)(e), *Florida Statutes* (1981), in resolving the territorial dispute. The Commission's findings of fact were found to be supported

---

[13] § 366.04(2)(e), *Fla.Stat.* (1981).

[14] § 366.04(3), *Fla.Stat.* (1981).

[15] *Tampa Electric Co. v. Withlacoochee River Electric Coop., Inc.*, 122 So.2d 471 (Fla. 1960), *cert. den.*, 377 US 952 (1964). *Choctawhatchee Electric Coop., Inc. v. Gulf Power Co.*, 465 So.2d 417, 420 (Fla. 1st DCA 1972).

by competent substantial evidence in the record, the appropriate standard for review of administrative orders.[16] The Supreme Court of Florida also agreed that, when "no factual or equitable distinction exists in favor of either utility, *Tampa Electric Co. v. Withlacoochee River Electric Cooperative, Inc.*, 122 So.2d 471 (Fla. 1960), [*cert. den.*, 377 US 952 (1964)] controls . . . ." [17] No federal question was involved before the Supreme Court of Florida.

It is essential to the jurisdiction of this Court under 28 USC § 1257 that a substantial federal question has been properly raised. Here, the validity of a Florida Statute was not "drawn in question," nor was a federal title, right, privilege, or immunity "specially set up or claimed." [18] Escambia River has not presented a substantial federal question, and the appeal should be dismissed.

(3) *Any federal question sought to be reviewed was not timely or properly raised or expressly passed on in the state court.*

> It has long been established that the Supreme Court is vested with no jurisdiction unless a federal question was raised and decided in the state court below.[19]

A review of the opinion of the Supreme Court of Florida [20] reveals that it is devoid of any discussion or consideration of any federal question. It certainly does not expressly pass on one. As discussed above, the decision of the Florida Court was solely one involving Florida law.

---

[16] § 120.68(10), *Fla.Stat.* (1981).

[17] *Escambia River Electric Coop. v. Florida Pub. Serv. Comm'n*, 421 So.2d 1384, 1385 (Fla. 1982).

[18] 28 USC § 1257(3).

[19] R. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978) 214, citing to *Crowell v. Randell*, 10 Pet. 368, 391; *Cardinale v. Louisiana*, 394 US 437, 438 (1969).

[20] *See* Appendix A of Jurisdictional Statement.

When the highest state court has failed to rule upon an alleged federal question, "the party invoking the Supreme Court's jurisdiction has the burden of showing that he properly raised the question . . . ." [21] and "it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party can affirmatively show the contrary." *Street v. New York*, 394 US 576, 582 (1969). As Mr. Justice Harlan stated:

> The rule that in cases coming from state courts this Court may review only those issues that were presented to the state court is not discretionary but jurisdictional. *Amalgamated Food Employees v. Logan Valley Plaza*, 391 US 308, 334 (1968) (dissent).

Appellant's passing references to vague constitutional rights in one heading of its brief to the court below, without any supporting argument, were not sufficient to have raised any federal question. [*See* discussion under point 1, *supra.*] It is obvious that no federal question was sufficiently and properly raised in the state court. It is essential that the federal issues, if any, be presented first in the state court.[22] Therefore, the appeal should be dismissed.

(4) *The judgment that is the subject of this appeal rests on an adequate non-federal basis.* The Florida Public Service Commission ruled, in effect, that it would not, under the particular facts of this case, prohibit Gulf Power Company from providing the requested electric service to Exxon and Air Products. The Commission properly resolved the matter, pursuant to the authority in Section 366.04(2)(e), by applying the "plain language as well as the spirit of Section 425.04, Florida Statutes." [23] The Supreme Court of Florida agreed with the

---

[21] R. Stern & E. Gressman, *supra* n.19, at page 214.

[22] *Webb. v. Webb*, 451 US 493 (1981).

[23] Order No. 10171, incorporated into the opinion of the Supreme Court of Florida at page A-2 of the Jurisdictional Statement.

Commission in its findings of fact and in the application of Florida law to those facts.

Since the decision below is founded on an exclusively non-federal basis, involving the construction of state statutes, the case cannot be the subject of either appeal or certiorari. The Florida Court's construction of the statutes must be accepted,[24] and the appeal dismissed.

CONCLUSION

Appellant has not presented its challenges to the Florida Public Service Commission's order in the proper form for invoking this Court's appellate jurisdiction. If, pursuant to 28 USC § 2103, the Court treats this appeal as improvidently taken and considers it as a petition for certiorari, the appellant has not raised a substantial federal question necessary to invoke the Court's jurisdiction under 28 USC § 1257(3). Additionally, any federal question sought to be reviewed by the appellant was not timely raised or expressly passed on in the state court, as required before this Court can assume jurisdiction. Finally, the decision below is so obviously correct, on an adequate non-federal basis, as to warrant no further review.

For all of these reasons, the appeal should be dismissed, or in the alternative, certiorari should be denied.

IT IS SO MOVED.

Respectfully submitted,

C. ROGER VINSON
(Counsel of Record)
BEGGS & LANE
700 Blount Building
P.O. Box 12950
Pensacola, FL 32576-2950
(904) 432-2451
Attorneys for
Gulf Power Company, Appellee

---

[24] *Kingsley Int. Pictures Corp. v. Regents of N.Y.U.*, 360 US 684, 688 (1959); *Guaranty Trust Co. v. Blodgett*, 287 US 509, 513 (1933).

Office-Supreme Court, U.S.
FILED
APR 25 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1513

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ESCAMBIA RIVER ELECTRIC COOPERATIVE, INC.,
Appellant,

v.

FLORIDA PUBLIC SERVICE COMMISSION and
GULF POWER COMPANY,
Appellees.

On Appeal From the Supreme Court of Florida

BRIEF OPPOSING THE MOTION TO DISMISS OF GULF POWER COMPANY, AND THE MOTION TO DISMISS OR AFFIRM OF THE FLORIDA PUBLIC SERVICE COMMISSION

HENRY L. GRAY, JR.
(Counsel of Record)
and WILLIAM H. CHANDLER
CHANDLER, GRAY, LANG & HASWELL, P.A.
P.O. Drawer O
Gainesville, Florida 32602
(904) 376-5226
Attorneys for Escambia River Electric Cooperative, Inc., Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

BRIEF OPPOSING THE MOTION TO DISMISS OF GULF POWER COMPANY, AND THE MOTION TO DISMISS OR AFFIRM OF THE FLORIDA PUBLIC SERVICE COMMISSION 1

ARGUMENT OPPOSING THE MOTION TO DISMISS OF GULF POWER COMPANY 2

(1) THIS APPEAL IS WITHIN THE APPELLATE JURISDICTION OF THIS COURT 2

(2) THIS APPEAL DOES PRESENT A SUBSTANTIAL FEDERAL QUESTION 2

(3) THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS TIMELY AND PROPERLY RAISED, AND PASSED ON BY THE STATE COURT 3

(4) THE JUDGEMENT THAT IS THE SUBJECT OF THIS APPEAL DOES NOT REST ON AN ADEQUATE NON-FEDERAL BASIS 4

ARGUMENT OPPOSING THE MOTION TO DISMISS OR AFFIRM OF THE FLORIDA PUBLIC SERVICE COMMISSION 5

CONCLUSION 7

APPENDIX

CERTIFICATE OF THE CLERK OF THE SUPREME COURT OF FLORIDA A-1

TABLE OF AUTHORITIES

CASES

Page

Atchison, Topeka, and Santa Fe Ry. Co. v. *Public Utilities Commission of the State of California*, 346 U.S. 346 (1953) 2

Bantam Books, Inc. v. *Sullivan*, 372 U.S. 58 (1963) 4

Chambers v. *Mississippi*, 410 U.S. 284 (1973) 3

Chicago B. & Q. R. Co. v. *Illinois*, 200 U.S. 561 (1906) 4

Cohen v. *California*, 403 U.S. 15 (1971) 4

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U.S. 282 (1921) 4

Gainesville-Alachua County Regional Electric Water and Sewer Utilities Board v. *Clay Electric Cooperative, Inc.*, 340 So. 2d 1159 (Fla. 1976) 4

Lawrence v. *State Tax Commission*, 286 U.S. 276 (1932) ... 3,4

New York, ex rel. Bryant v. *Zimmerman*, 278 U.S. 63 (1928) 3

FEDERAL STATUTORY PROVISIONS

28 U.S.C. §1257(2) 2,4

FLORIDA STATUTORY PROVISIONS

§366.04(3), *Fla. Stat.* 4

§425.04, *Fla. Stat.* 3

RULES OF THE SUPREME COURT

U.S. Sup. Ct. Rule 16.5 1

OTHER AUTHORITIES

32A AM. JUR., *Federal Practice and Procedure* §674 4

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1982

No. 82-1513

ESCAMBIA RIVER
ELECTRIC COOPERATIVE, INC.,
Appellant,

v.

FLORIDA PUBLIC SERVICE COMMISSION and
GULF POWER COMPANY,
Appellees.

Brief Opposing the Motion to Dismiss
of Gulf Power Company, and the
Motion to Dismiss or Affirm of
the Florida Public Service Commision

MAY IT PLEASE THE COURT:

Appellant, Escambia River Electric Cooperative, Inc., submits this Brief in Opposition to the Motion to Dismiss filed by the Appellee, Gulf Power Company, and the Motion to Dismiss or Affirm filed by the Appellee, The Florida Public Service Commission, pursuant to Rule 16.5, Rules of the Supreme Court of the United States.

I

ARGUMENT OPPOSING THE MOTION TO DISMISS OF GULF POWER COMPANY

Appellee, Gulf Power Company, has based its Motion to Dismiss on four separate grounds, each of which is expresssly treated hereinafter.

1. THIS APPEAL IS WITHIN THE APPELLATE JURISDICTION OF THIS COURT.

It is alleged that Appellant's jurisdictional statement is not in conformity with 28 U.S.C. §1257(2). Such argument is without merit.

Appellant has expressly cited *Atchison, Topeka, and Santa Fe Ry. Co.* vs. *Public Utilities Commission of the State of California,* 346 U.S. 346 (1953), as the authority for the appellate jurisdiction of this Court under 28 U.S.C. §1257(2). In *Atchison, supra,* this Court expressly held that the Orders of the Public Utility Commission of the State of California represent the exercise of legislative authority and are "state statutes", within the meaning of Title 28 U.S.C. 1257(2). This Court then concluded that a ruling of the highest court of the state denying review of the Orders of the Commission, issued pursuant to specific statutory authority, and challenged as violating the United States Constitution, amounted to a decision in favor of the validity of the statute upon which the Orders were based, and is properly reviewable by this Court under 28 U.S.C. 1257(2).

2. THIS APPEAL DOES PRESENT A SUBSTANTIAL FEDERAL QUESTION.

This issue has been substantially addressed by Appellant in its jurisdictional brief. Appellee's argument that there is no substantial federal question does not comport with reason and logic. The power to regulate carries with it the power to destroy unless regulation is conducted within permissible constitutional

standards. Section 425.04, *Fla. Stat.*, provides the powers granted to cooperatives by the Florida legislature. Such statutory authority contains no provision limiting cooperatives' ability to serve any type of customer. The decision of the Florida Public Service Commision as affirmed by the Florida Supreme Court has singled out cooperatives by denying them basic and substantial fourteenth amendment rights, upon the announced policy that cooperatives are federally subsidized. Obviously, such decision presents squarely to this Court the substantial issue of a denial of federally protected rights. It is not frivolous, and such issue was presented properly and in a timely manner.

3. THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS TIMELY AND PROPERLY RAISED, AND PASSED ON BY THE STATE COURT.

A certificate of the Clerk of the Florida Supreme Court certifying that the question was presented and argued appears in the appendix to this brief. A certified copy of such certificate has been forwarded by the Florida Supreme Court to the Clerk of the United States Supreme Court. An Examination of the opinion of the Supreme Court of Florida, when read in the light of the issues presented to it for determination, will reveal that the decision necessarily had to decide the federal question, thereby upholding the action of the Florida Public Service Commission in regard to Appellant's assertion that the Order was constitutionally impermissible. The necessary effect of the Order of the Florida Supreme Court is a denial of Appellant's claim of violation of fourteenth amendment rights. *New York, ex. rel. Bryant* vs. *Zimmerman,* 278 U.S. 63, 67. Further, the failure of the Florida Supreme Court to articulate its denial of the constitutional challenge is just as reviewable as an express decision on that point. *Chambers* vs. *Mississippi,* 410 U.S. 284, 290.

In *Lawrence* vs. *State Tax Commission,* 286 U.S. 276, 282-283, this Court held that an erroneous failure to pass on the federal constitutional objections to a state statute is treated by

the Court as equivalent to a finding of validity within the meaning of §1257(2), so that an appeal will lie. As long as the statute has been sustained, the Court has necessarily rejected a timely challenge on constitutional grounds. Its silence in this respect is immaterial and cannot destroy Appellant's right to appeal under §1257(2). *Lawrence* vs. *State Tax Commission, supra.* Further, the validity of a state statute has also been sustained within the meaning of §1257(2), when a state court holds the statute applicable to a particular set of facts as against a contention that such an application is invalid on federal grounds. *Dahnke-Walker Milling Co.* vs. *Bondurant,* 257 U.S. 282; *Bantam Books, Inc.* vs. *Sullivan,* 372 U.S. 58, 61, n.3; *Cohen* vs. *California,* 403 U.S. 15, 17-18.

4. THE JUDGMENT THAT IS THE SUBJECT OF THIS APPEAL DOES NOT REST ON AN ADEQUATE NON-FEDERAL BASIS.

The Florida Public Service Commission resolved the territorial dispute between Appellant and the Appellee, Gulf Power Company, upon the basis of a policy favoring Gulf Power Company because of alleged preferential economic advantage given cooperatives by Congress. Appellant has asserted that such decision has no legitimate, rational, state regulatory basis, and is a denial of Appellant's fourteenth amendment rights. Clearly, any alleged preferential economic advantage given cooperatives by Congress cannot be the basis of legitimate, rational state regulation of territorial disputes, when the legitimate state regulatory purpose is the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities. §366.04(3), *Fla. Stat., Gainesville-Alachua County Regional Electric Water and Sewer Utilities Board* vs. *Clay Electric Cooperative, Inc.,* 340 So. 2d 1159 (Fla. 1976).

In order that the state decision be found to rest upon an adequate state ground, it must not be inconsistent with federal law. If a decision on the federal issue would change the outcome of the case, and the state ground is not adequate, then this Court has jurisdiction to review the case. 32A AM. JUR. *Federal Practice and Procedure* 2d §674, citing *Chicago, B. & Q. R. Co.* vs. *Illinois,* 200 U.S. 561.

II

ARGUMENT OPPOSING THE MOTION TO DISMISS OR AFFIRM OF THE FLORIDA PUBLIC SERVICE COMMISION

While Appellant's position is adequately set forth in its jurisdictional statement, it is desireable that a response be made to the Motion to Dismiss or Affirm filed by the Appellee, The Florida Public Service Commission. Such motion makes numerous references to the transcript (Motion pp 2-12). Interestingly, it makes no reference to the findings of fact in its Order of July 31, 1981 (App. B to Appellant's jurisdictional statement), preferring, rather, to now assert additional "facts" for consideration by this court.

Appellee, The Florida Public Service Commission, acknowledges that it found no equitable or factual distinction in favor of either utility (Motion pp 12-13), thereby resolving the dispute by a "policy" decision in favor of Appellee, Gulf Power Company (Motion pp 13). The motion then states that the Florida Public Service Commission:

> " . . . looked at the differences in the financial composition . . ." (Motion pp 13).
>
> " . . . recognized that cooperatives receive preferential income tax treatment, substantial loans and low loan interest rates . . ." (Motion pp 13).

and then stated that:

> ". . . Gulf must pay a higher interest rate for its loans . . ." (Motion pp 13).
>
> " . . . Gulf . . . must pay dividends high enough to attract customers . . ." (Motion pp 13).
>
> " . . . These higher capital costs increase (Gulf's) financial risk . . ." (Motion pp 13).

" . . . (Gulf) has higher business risk than Escambia . . ." (Motion pp 14).

" . . . These considerations are significant enough that when all other factors are equal, (Gulf) should have the ability to serve the new territory . . ." (Motion pp 14).

The assertion by Appellee, The Florida Public Service Commission, that the policy decision based upon the above "relevant" factors had a direct and rational relationship to the state's legitimate interest in assuring "an adequate and reliable source of energy for operation and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilitites", is so *underwhelming* and devoid of the rudimentary principles of logic that it actually defies one's imagination.

Can it be said that Gulf's extension of a transmission line 6.7 miles through an area historically and exclusively serving 1,102 of Escambia's customers is the avoidance of uneconomic duplication of facilities? Can it be said that the regulatory powers given to The Florida Public Service Commission to resolve territorial disputes have been exercised in a constitutionally permissible manner?

A cursory examination of the admissions and conclusions contained in the motion of the Florida Public Service Commission will reveal that the answer to each question is a resounding "no!"

CONCLUSION

The motion of Appellee, Gulf Power Company, to dismiss Appellant's appeal, and the motion of the Appellee, The Florida Public Service Commission, to dismiss or affirm, should be denied, and probable jurisdiction noted in view of the obvious constitutional violations and the substantial nature of the issues involved.

Respectfully submitted,

Henry L. Clay, Jr.

CHANDLER, GRAY,
LANG & HASWELL, P.A.
P. O. Drawer O
Gainesville, Florida 32602
904-376-5226
Counsel of Record for Appellant

IN THE SUPREME COURT OF FLORIDA

I, SID J. WHITE, Clerk of the Supreme Court of Florida, do hereby certify that the following issue was presented in appellant's brief in the case of *Escambia River Electric Cooperative, Inc.* vs. *Public Service Commission, et al.*, Case No. 61, 679:

POINT II

THE ANNOUNCED POLICY BASIS UPON WHICH PSC RENDERED ITS DECISION AMOUNTS TO AN ARBITRARY AND OPPRESSIVE EXERCISE OF GOVERNMENTAL POWER, IS CONTRARY TO THE ANNOUNCED POLICY OF THE PSC, IS CONFISCATORY OF APPELLANT'S RIGHTS, IS A DENIAL OF DUE PROCESS OF LAW, AND DENIES APPELLANT ITS RIGHT TO EQUAL PROTECTION OF THE LAW, AS GUARANTEED BY SECTIONS 2 AND 9 OF ARTICLE I OF THE CONSTITUTION OF THE STATE OF FLORIDA, AND THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

IN WITNESS WHEREOF I have hereunto set my hand and official Seal of the Supreme Court of Florida, at Tallahassee, the Capital, this the 15th day of April, 1983.

/s/ Sid J. White

Clerk of the Supreme Court of Florida.

(seal)